Posted on: January 1, 2011

"HURT" – PROVING CAUSATION IN CHRONIC PAIN CASES

One of the most significant challenges we face as personal injury lawyers is proving chronic pain in cases where there is no physical explanation for continuation of pain, weakness, discomfort. For lawyers, proving chronic pain is chronically painful. That is because, second only to liability itself, i.e. proving fault, proving causation carries with it the ultimate risk of non-persuasion.

Chronic pain is primarily a psychological affliction. Psychologists know that one of the continuing criteria of the diagnosis of chronic pain is that the patient is not malingering. The inclusion of this factor in the criteria for the diagnosis perpetuates and reflects the distrust of chronic pain in the court of public opinion. For lawyers, public opinion is important, particularly in jury trials. We are preoccupied with the notion that in order to succeed we must disabuse the jury of its presuppositions about chronic pain. It would be a better world if chronic pain were accepted and understood to be a rare and unfortunate outcome of trauma. But for now, we must work within the present limits of the public imagination so as to ensure our clients and patients don't lose their cases because they failed to prove causation.

What is causation? Causation, at law, is a question of fact. It is based on what is known as the "but for" test. As lawyers, we must prove that "but for" the accident, out clients would not have suffered from chronic pain. Sometimes that test would lead to an unfair result. Consider the case of *Cook v. Lewis*. Two hunters each fired a weapon, a plaintiff was injured, and it was impossible to determine which of the hunters fired the injurious shot. The but for test would result in neither hunter being liable.

This lends to circular causation such that it is impossible to establish factual causation. So instead, in cases like Cook v Lewis, the courts resort to what is known as the "material contribution" test. This test does not establish factual causation, but gives judges a way out in rare cases where the but for test would lead to an unfair result. Another circumstance is in cases of "dependency causation". These cases occur where proving factual causation using the but for test requires hypothesizing about what a third party would have done absent the negligence of the tortfeasor. Because it requires evidence about the potential conduct of a third party, rather than the conduct as between the negligent party and the plaintiff, it makes the but for test impossible. An example is found in the tainted blood cases against the Canadian Red Cross. It was impossible to prove what an infected donor would have done had they been properly screened so the plaintiff would in those cases be unable to prove factual causation.

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The material contribution test will not be used unless special circumstances exist – these special circumstances, of which I have given two examples, are determined by two requisite factors. First, it must be impossible to prove causation using the but for test due to factor outside the plaintiff's case. Second, the defendant must have breached a duty to the plaintiff and exposed the plaintiff to an unreasonable risk of injury.

The principles involving causation and chronic pain can all be found in *Maslen v. Rubenstein*. It fully teaches the legal mine field which is chronic pain. And it says that claims for chronic pain and associated psychological problems require a plaintiff to establish a causal link with the defendant's unlawful conduct rather than the plaintiff's own desire for care, sympathy, relaxation. The plaintiff must also establish an inability to overcome problems by his or her own resources or will power.

Ultimately, the court will require evidence of a convincing nature to overcome the improbability of continuing pain, absent objective signs, well beyond the normal recovery period.

In these cases, the threshold question is whether or not the pain is real in the sense that the plaintiff experiences it. Cases where the pain is not real will be eliminated by ordinary tests of credibility. Assuming that hurdle is cleared, the pain still may be found to be outside the realm of legal responsibility. If the plaintiff is believed, how can this be so?

First of all, let us examine the facts of *Maslen*. She suffered a classic soft tissue injury – a neck and shoulder strain. After discharge from hospital, she developed numbness and tingling in her left arm and hand. Her symptoms improved and the evidence indicated that by 10 months she travelled to her native Spain. She was very active and her neck problems resolved. However, as soon as the plane hit the tarmac in Vancouver, she started having neck problems again. Three and a half years post injury, following 300 physiotherapy treatments and referrals to a number of specialists, the plaintiff still claimed to be disabled from her job as a seamstress and all of her recreational and domestic activities.

Her problems were ultimately regarded as having a psychological origin. The key to the judgment and to proving chronic pain, absent a physical reason, is that to recover it must be established that the pain is beyond the plaintiff's control. This is a threshold question of causation, not mitigation. If it is not answered favourably, you lose – damages are not merely discounted; they are eliminated. The law says that to hold otherwise, that is, to require the defendant to show that a plaintiff could overcome her problems, would require the defendant to prove the primary issue of causation.

The law is preoccupied with any principle, or lack of principle, which might open the floodgates. This is one of the first things we learn in law school. That English common law is conservative. After all, it came from

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England.

According to the judgment of *Maslen v. Rubenstein*, if psychologically entrenched pain exists, or continues, because the plaintiff for some reason wishes to have it, or does not wish it to end, its existence or continuation will be deemed to have a subjective or internal cause. To show that the cause lies in an unlawful act of the defendant, rather than the plaintiff's own choice, the plaintiff must negative that alternative. The plaintiff must prove the defendant caused the loss.

It is unlikely that medical experts can answer, as a matter of expert opinion, the ultimate questions on which these cases turn. That is not to say it is inappropriate for a doctor to comment on the patient's reliability or truthfulness or motivation. In fact, that is often very helpful, particularly if their experience with the patient over time is extensive and has led them to believe there is no overriding desire on their patient's part for sympathy or care, or compensation, or that they cannot overcome their problems by resort to their own resources.

Naturally, in addition to medical evidence, evidence from family and friends is absolutely critical in these cases. Oral testimony at trial from an old friend or family member is not only critical to the outcome, it is critical to the satisfaction of the client's expectations that their story be told. Well prepared "will say" evidence can provide significant leverage in settlement negotiations.

I don't want to leave this subject without doing my part to clear up the confusion about a recent decision of the Supreme Court of Canada on a closely related theme – *Mustapha v. Culligan* of Canada. For the benefit of those not familiar with Mustapha, the plaintiff became ill when he saw a dead fly in an unopened bottle of drinking water supplied by the defendant. He developed major depressive disorder, anxiety and a phobia about showering.

The Trial Judge awarded damages, Court of Appeal reversed the Trial Judge, and Supreme Court of Canada agree that the plaintiff's claim should be dismissed.

The court said that the plaintiff failed to establish that it was foreseeable that a person of ordinary fortitude would suffer serious injury. The court thought the Trial Judge ignored the objective component of test of reasonable foreseeability, remember foreseeability in order to provide the basis for recovery must be reasonable. So again, it was the subjectivity of the Plaintiff's experience which ruined his attempt at the threshold issue. The damages could not be reasonably supposed to be within the contemplation of the parties. In that case, the court found:

(a) the bottler owed a duty of care;

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(b) the bottler breached the duty of care;

(c) the plaintiff sustained damages;

(d) the damages were not legally caused by the defendant's negligence because the damages were deemed to be too remote.

It is important to remember that the court accepted Mustapha suffered a serious injury. In this regard, the court distinguished psychological injuries from psychological upset. Personal injury at law connotes serious trauma or illness. The law does not recognize upset, anxiety, disgust, agitation or other mental states that fall short of injury. I would not purport to define compensable injury exhaustively, except to say that it must be serious and prolonged and rise above the ordinary annoyances, anxieties and fears that people living in society routinely, if sometimes reluctantly, accept. Quite simply, minor and transient upsets do not constitute personal injury, and hence do not amount to damage – life goes on. Mustapha's injury was accepted as serious and prolonged.

In the leading case in the law of negligence, *Donoghue v. Stevenson*, May Donoghue found a snail in her ginger beer, alleged gastroenteritis, spent three days in the Glasgow Royal Infirmary and recovered. Mustapha found a fly in a bottle and suffered a major psychiatric illness and didn't recover. The key to understanding the decision and to reconciling it with *Donoghue v. Stevenson* lies in Mustapha's extreme reaction: unusual or extreme reactions to events caused by negligence are imaginable but not reasonably foreseeable. The Supreme Court of Canada expects reasonable fortitude and robustness of Canadians and will not impose liability for the exceptional frailty of certain individuals. The law imposes an obligation to compensate for any harm done on the basis of reasonable foresight, not as insurance.

The court pointed out in Mustapha that there was no evidence that a person of ordinary fortitude would have suffered injury from seeing a fly in the bottle – the expert witnesses were not asked this question – the court noted they ought to have been.

What conclusions can be drawn from these cases:

1. Absent objective evidence of an injury, cases involving chronic pain and psychological injuries which seem well outside of the realm of reasonable expectation need to be handled very carefully:

(a) the material contribution test – is reserved for special circumstances;

(b) natural questions will arise in these cases, and must be addressed:

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(i) Why has the plaintiff suffered so long?

(ii) Is the reaction outside the plaintiff's control? If so why?

(iii) Are they really seeking care, sympathy, compensation? Ms. Maslen won $500,000 in a lottery six months prior to her injury – that evidence helped assuage the court's concern about her motivation;

(c) would a person of ordinary fortitude have suffered an extreme reaction?

None of this may be necessary if these cases were being heard by medical and legal professionals. Because they are often heard by eight good Canadians all lacking a background in law or medicine, a practice approach must be taken to obtain a just result.

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